



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 16 OF 2019

LESITT, J

REPUBLICPROSECUTOR

-VERSUS -

NADIFO MOHAMED ABSHIRACCUSED

RULING ON BAIL

1. The accused **NADIFO MOHAMED ABSHIR** is facing a charge of murder contrary to **Section 203** of the **Penal Code**. It is alleged that she murdered **ISMAHAN ABDISALAN SHEIKH OMAR** on the 24th February, 2019 at Eastleigh 1st Avenue, 10th Street within Nairobi County.
2. Immediately after plea was taken on the 27th March, 2019 the accused through her defence counsel Mr. Hakim orally applied for bail. The application was finally heard on 2nd May 2019 after the prosecution, filed a replying affidavit dated 1st April 2019 and the accused also filed a replying affidavit dated 9th April, 2019. A family member of the deceased also filed an affidavit dated 2nd May 2019.
3. The bail application has been opposed by both the prosecution and the family of the victim.
4. The prosecution has advanced four (4) grounds. One that the accused is of Somalia origin and even though she has been in Kenya since 2012, she has no documentation. The prosecution contends that the accused has no fixed abode and is a flight risk. The Prosecution also opposed bail on the grounds that not only is there a likelihood of interference with witnesses, but that the family of the accused has been pushing the family of the deceased to withdraw the case from court. The other ground urged was that the life of the accused may be in danger from the community if she is released as there was hostility.
5. The family of the victim opposed bail on grounds; one that the accused is not a Kenyan and all her close family members live in USA and the rest in Somalia. They urged that the accused was a flight risk. Second ground argued was the fact that the accused had no fixed abode and that she lived in rented premises meaning she can abandon them at any time making it difficult to track her.
6. Thirdly, the advocate for the victims argued that the accused practiced black magic and is not a spiritual healer as she claimed in her affidavit. Counsel urged that there was fear that if released, the witnesses will be afraid to come and testify in court.
7. Mr. Hakim for the accused urged the court to release the accused. He filed written submissions which he highlighted in court. In the submissions counsel urged that the accused like every person charged in court is entitled to bail under **Article 49(1) (h)** of the **Constitution**. Counsel cited provisions of **section 123** of the **Criminal Procedure Code** and **Paragraph 4** of the **Bail and Bond Policy Guidelines** and urged that following the law and principles applicable the accused is entitled to bail.
8. Mr. Hakim submitted that the prosecution has not availed any compelling reasons to warrant the accused being denied bail. Counsel urged that what the prosecution has done in the replying affidavit of the investigating officer was to state the reasons why they oppose bail without giving any proof. Counsel relied on the case of **HASSAN OMAR MAHATI & ANOTHER [2014] eKLR** for the proposition that the onus of proving justifiable reasons for denial of bail lay squarely on the prosecution.
9. This court requested for a pre-bail report from the Probation Office. One dated 16th May 2019 was received. I have considered that the report acknowledges that the accused is a refugee from a disintegrated family whose siblings and parents are all living in different countries. The report has also brought to light the fact that the accused fixed place of abode is not known since the landlord has reposessed her rented

premises.

10. The Probation Officer stated in her report that the accused is a re-known superstitious lady who instills fear in the community. The officer also stated that the accused mother who lives in the USA though admitting to the fact that the accused was a superstitious woman, was willing to deposit a cash bail of Ksh.300,000/= to secure the accused release on bail.

11. The Pre bail report filed incorporated the Victim Impact Statement. It is evident from the statement that the victims' family is at pains from the loss of their daughter/ granddaughter. They are apprehensive if the accused is released on bail ,she will interfere with the witnesses through her "spiritual" manipulation and her parent's wealthy background.

12. The Easleigh community where the accused and Victim lived was equally interviewed. They expressed their reservations if the accused was released stating that the accused was a "notorious woman" who was no longer welcome to the community and in Kakuma refugee camp where she once lived. The community was of the view that the accused risks being harmed by the public if released on bail as her details were all over social media. The probation officer stated that one could sense the hostility being directed towards the accused. The community was apprehensive the accused may revenge using her spiritual manipulations.

13. **Article 49(1) (h)** of the Constitution gives an accused person the right to bail pending their trial. It states:

"an arrested person has the right to be released on bond or bail on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released."

14. The wording of the Article denotes that the right to bail is not an absolute right. The court has to establish whether there exists compelling reasons to warrant the accused being denied the right to bail.

15. **The Bail and Bond Policy Guidelines at Paragraph 4:9** sets out what the court should consider in order to determine whether there exist compelling reasons to deny bail. These are:

a. Nature of charge or offence and seriousness of the punishment.

b. The strength of the prosecution case.

c. The character and antecedents of the accused persons.

d. The failure of the accused person to observe bail or bond terms.

e. The likelihood of interfering with witnesses,

f. The need to protect victims of the crime.

g. The relationship between accused and potential witnesses.

h. The best interest of child offenders.

i. The accused person was a flight risk.

j. Whether the accused person was gainfully employed.

16. In determining whether or not to grant bail to the accused, the court has to balance the right of accused under **Article 49 (1) (h)** of the **Constitution** and those of all other interested parties as captured. The court is guided to know what constitutes compelling reasons as set out under the **Bail and Bond Policy Guidelines**.

17. The prosecution in this case has opposed the accused grant of bail on four major grounds. I will evaluate each independently.

18. The first ground relied upon by the prosecution is the contention that there is likelihood of the accused interfering with witnesses. The investigating officer avers in his replying affidavit that the accused family has been pushing to have the victims' family withdraw the case.

19. The Officer further avers that the deceased mother had filed a complaint vide OB NO 77/31/3/2019 alleging that her life was in danger as people were approaching her asking her to withdraw this matter and have it sorted through alternative dispute mechanisms. The prosecution has also alleged that the accused and deceased are family members and are potential witnesses. The victims' family representative in her affidavit avers that the relatives and friends of the accused make up majority of the witnesses in this case.

20. The accused has replied to that contention and averred that she has no intention of interfering with the witnesses. She avers that she is not related to the accused family and that the prosecution has not placed any material evidence to prove interference with witnesses either directly or indirectly.

21. The Pre-bail report also alluded to the fact that the accused was a re-known "superstitious lady" and that the victims' family as well as the community are apprehensive of the possibility of "spiritual" interference. The report also alluded to the fact that the clans of the accused and

deceased had made an attempt to settle the matter through alternative dispute resolution mechanisms.

22. Mr. Hakim counsel for the accused relied on **REPUBLIC VS. DWIGHT SAGARAY & OTHERS, MILIMANI HCCR. CASE NO. 61 OF 2012** for the proposition that prosecution needed to place material before court to demonstrate actual interference through threats to witnesses for example direct or indirect incriminating communication between the accused and witnesses.

23. Mr. Hakim also cited **REPUBLIC VS. RICHARD ADEN MILIMANI HCCC NO. 48 OF 2016** for the proposition that a mere relationship between accused and witnesses, especially one which is not filial is not sufficient to prove likelihood of interference.

24. I have considered the contention that the accused is related to the deceased family. The accused has denied the same. I find that the fact that the mother to the deceased has filed a complaint with regards to coercion, the fact that the accused relatives have made attempts to have the matter resolved out of court and are said to form a major part of the witnesses to be called, and the fact that the community is also apprehensive of the accused superstitious powers in relation to interference of witnesses all point to a likelihood of interference with witnesses both directly and indirectly.

25. The second ground relied upon by the prosecution in opposing the accused application is the fact that they have reason to believe that she is a flight risk. They have stated that the accused has no documentation to back up her claims that she is a refugee. The prosecution have also contended that given the fact that the accused was a refugee, she had no fixed abode and would therefore be a flight risk.

26. The accused in her replying affidavit acknowledges that indeed she has been a refugee. She however contends that she has been living in Kenya for a period of 10 years, with a fixed abode. She further avers that she has married a Kenyan and sired two children out of that marriage.

27. Mr. Hakim counsel for the accused cited **REPUBLIC VS. DANSON NGUNYA & ANOR [2010] eKLR** for the proposition that the prosecution has a duty to supply the court with any material in support of the opposition to grant of bail to enable the court reach an informed decision. Counsel also relied on **REPUBLIC VS. RICHARD ADEN**, Milimani supra for the proposition that being a flight risk because of accused being a foreigner could be cured by stringent bond terms.

28. The pre-bail report has shed more light into the issue of the accused country of origin. The report reconfirms that the accused is a refugee who was residing in Eastleigh at a rented house. The report however states that the landlord of the place where the accused was residing has since repossessed the house and hence there is no other traceable fixed abode for the accused. The report has also brought to light the fact that the accused has no other relatives living in Kenya. Her family are domiciled across the world.

29. Having considered the fact that the accused has no papers proving her status in Kenya. The fact that by her own concession, she is a Somali refugee who has resided in Kenya for over 10 years. The fact that she has no fixed abode in Kenya and resides in rented houses of which her last known rented house has been repossessed by the landlord. I find that the prosecution have proved that the accused is a flight risk and granting her bail would not be in the interests of Justice.

30. Finally the prosecution have urged that the accused life might be in danger as and when released on bail. The prosecution has stated that they have received information that members of the public are planning revenge. The accused has averred in her replying affidavit that it is the duty of the police and state to guarantee her safety. The accused further contends that her security threat is not a compelling reason to warrant the denial of bail.

31. Regarding the ground cited that the life of the accused may be at risk if released, Mr. Hakim cited the case of **REPUBLIC VS. GLADYS WAMBUI MWANGI [2018] eKLR** for the proposition that it is the duty of the State to ensure safety and security of its citizens and that once police are aware of highlighted tension they should put in place security measures.

32. Mr. Hakim cited the case of **REPUBLIC VS. DANFORD KABAGE MWANGI [2016] eKLR** for the proposition that in order to prove grounds for refusal of bail, the prosecution must prove one of four risks. One that accused will interfere with the course of justice. Two risk that accused will commit other offences. Three accused will be at risk of harm. Four there will be risk to preservation of public order if accused is released.

33. The Probation Officer stated in her report that the community at Eastleigh is very hostile towards the accused. The probation officer reported that the community is well versed with the details of the accused and her superstitious nature has elicited hatred against the accused.

34. I find that the prosecution have established that the animosity and hostility towards the accused evident in the community is enough to endanger the life of the accused. She is a suspected superstitious healer and the apprehension that she may revenge against the community and witnesses is a serious matter to wish away.

35. The primary consideration in bail applications is whether the accused will turn up for their trial. **Section 124 of the Criminal Procedure Code** states so.

36. Having considered the circumstances prevailing in this case, I find that the prosecution has established that the accused is a foreigner residing in Eastleigh with no fixed abode and with no relatives to accommodate her pending her trial. I find that this fact is enough to treat the accused as a flight risk. I find that the apprehension expressed by the community poses a danger to the accused life if released on bail. I find that these two reasons comprise compelling reasons that warrant the denial of the accused application.

37. In the circumstances, I decline the accused application for bail. The accused will remain in custody pending the trial of her case.

DATED, SIGNED AND DELIVERED THIS 28th DAY OF MAY, 2019.

LESIT J

JUDGE